

**DELEGATING DEMOCRACY – THE SIPHONING OF IMMIGRATION POWER FROM  
CONGRESS TO THE STATES AND ADMINISTRATIVE AGENCIES, AND THE NEED FOR A  
NEW APPROACH.**

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The question of who is and is not an American has occupied Americans and non-Americans alike since the inception of the United States.<sup>1</sup> Unlike many other nations we don't define belonging based on particular criteria such as race, ethnicity, religion or bloodline.<sup>2</sup> Instead the idea of who belongs and who doesn't is defined by a vague, shifting and uncertain patchwork of laws, customs, history and assumptions that Americans, their government and immigrants make about what it takes to be an American. This ambivalence about national identity is not confined to abstract questions of belonging. Ordinary Americans as well as their elected representatives in Congress face the question of who is and is not an American every time they confront uneasy and conflicting choices regarding immigration.

Congressional ambivalence on these difficult issues often results in decisions that tend to delegate the bulk of the decision-making to administrative agencies and state

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<sup>1</sup> In fact the Revolutionary War itself was probably the first of many battles to define who Americans really are as a nation, as a people, and as an idea. The adoption of Constitution, the Westward expansion, the Civil War, the Marathy era, and the Civil Rights movement are but a few of seminal events in American history that continued to shape our perception of who is and is not American.

<sup>2</sup> For example, Germany, Switzerland and Japan define citizenship primarily in terms of lineage or bloodline (*jus sanguinis*) as opposed to citizenship by birth (*jus soli*) in the United States. See German Embassy in Ottawa, at [http://www.ottawa.diplo.de/en/04/citizenship\\_20law/UB\\_20citizenshiplaw.html](http://www.ottawa.diplo.de/en/04/citizenship_20law/UB_20citizenshiplaw.html) (describing recent changes in German law allowing acquisition of citizenship by birth (*jus soli*) in addition to citizenship through bloodline); See also Gildas Simon, Who Goes Where at [http://www.unesco.org/courier/1998\\_11/uk/dossier/txt21.htm](http://www.unesco.org/courier/1998_11/uk/dossier/txt21.htm) (describing different models of citizenship based on blood and birth, using examples of Switzerland, Japan and others as countries defining citizenship in terms of bloodline).

governments,<sup>3</sup> with Congress choosing to make vague pronouncements in hopes that they will satisfy constituents and the lobbyists alike.<sup>4</sup> I call this approach “have your cake and eat it too,” because it allows Congress, faced with conflicting pressures coming from businesses, immigrant lobbies, and other stakeholders, to escape the responsibility for failures and take credit for successes of immigration policies. Congress manages to have its cake and eat it too at the same time as it shifts the brunt of the decision-making to state and federal agencies run by unelected bureaucrats. This ability of Congress to delegate broad legislative power to other branches of government lies at the heart of the ironically named non-delegation doctrine.

Some courts and scholars think that this is a perfectly healthy way for a democracy to function, arguing that agencies’ particularized expertise in the field, the scale and sheer volume of regulation necessary, and the opportunity for deliberation inherently unavailable to a legislative body all require broad, general directives from Congress.<sup>5</sup> Others, including this author, view the problem as a more fundamental failure

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<sup>3</sup> See generally Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: Norton 1969) (discussing the dangers of vagueness and generality of statutes that delegate power to agencies) (hereinafter Lowi, *The End of Liberalism*).

<sup>4</sup> *Id.*

<sup>5</sup> See *Loving v. United States*, 517 U.S. 748, 758 (1996) (“To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers’ design of a workable National Government.”); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”). See also *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (“The judicial approval accorded these ‘broad’ standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems.”); See generally Bruce A. Ackerman & William T. Hassler, *Clean Coal/Dirty Air*, 54-58 (Yale University Press: 1981) (using case study of Clean Air Act to suggest that broad delegations to agencies may produce policy results superior to detailed legislated solutions, in part because of interest group influence on Congress).

of democracy, a symptom of government in crisis and the solution as a prescription to restore the system back to what it was originally intended to be.<sup>6</sup>

Whatever merits these competing theories present, the importance of the form and substance that Congressional delegation takes in relation to immigration cannot be overestimated, given the plenary power of Congress over the matter.<sup>7</sup> People's lives are literally at stake. Access to basic necessities of life is at stake. Child custody, health care, transportation and jobs are at stake. Truly, few other areas of Congressional delegation deal more directly with the most basic aspects of people's livelihood than administrative agencies' regulation of non-citizens.<sup>8</sup> I shall argue that a different doctrine of delegation in the context of immigration and alienage law is necessary, if we are to fulfill our commitment to the democratic ideal of holding our government accountable to the wishes of the governed.

To accomplish this goal, this paper will seek to both ask and answer two questions: (1) is plenary power Congress enjoys over immigration delegable and to whom, and if so (2) how? The answers to these two questions underline the essence of the new delegation doctrine I propose. I will call it explicit delegation. I answer the first question in the affirmative, noting that nothing in either history or text of the Constitution precludes Congress from delegating its power to federal administrative agencies and the

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<sup>6</sup> See e.g., Lowi, *The End of Liberalism*, *supra* note 3; Devid Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993) (proposing strict non-delegation doctrine as a way to police abuses in government); See also Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 *Colum. L. Rev.* 2097 (2004) (arguing for a new exclusive system of delegation to correct past problems) (hereinafter Merrill: *Exclusive Delegation*).

<sup>7</sup> See e.g., *Chinese Exclusion Case*, 130 U.S. 580 (1889) (stating that any attempt to restrict Congressional power to exclude aliens would be a diminution of the sovereignty of the United States); see also *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens].").

<sup>8</sup> For example U.S. Citizenship and Immigration Services (Department of Homeland Security division) administers programs as diverse as adoptions, naturalization and citizenship, refugees and asylum petitions, issuance of employment visas and others. *Immigration and Services Benefits at* <http://uscis.gov/graphics/services/index.htm>.

states *in the same manner*. The second and an equally difficult question concerns the extent and the nature of Congressional delegation. Here I shall argue that Congress needs to adopt explicit delegation doctrine as a principle vehicle for delegating legislative power to both federal agencies and state governments.

Part I of this paper begins with the general contours of the existing delegation doctrine and then focuses on the delegation of plenary power of Congress over immigration and alienage law in both intra-federal and federal-to-state regimes. I used restrictions on employment of aliens to illustrate the general principles of delegation. Part II begins with the discussion of weaknesses of the non-delegation doctrine and proposes explicit delegation as a new and more desirable alternative. In this context I discuss the implications and the practicality of extending the reach of explicit delegation to both intra-federal and federal-to-state levels, arguing that exclusivity of immigration power in federal government requires explicit delegation, but does not bar delegation altogether. Finally, Part III discusses of the role of the judicial review of agency and state actions pursuant to Congressional delegation under the new regime of explicit delegation. I conclude with a discussion of reasons why delegating power to both State and federal administrative agencies would not just be a more doctrinally consistent approach, but would also increase transparency and efficiency of our government, given the new regimes of judicial review I proposed.

## **Part I: Non-Delegation - a Story of the Most Misabeled Doctrine in American Jurisprudence**

### *Section A - Nature and history of federal delegation – a legacy of doctrinal confusion*

The Constitution assigns all legislative powers of the federal government to Congress. Section 1, Article I of the U.S. Constitution states this much: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”<sup>9</sup> For over two centuries the Supreme Court viewed this clause, however, to mean that Congress could vest the executive branch of government with its legislative authority, as long as there was some intelligible principle guiding this delegation.<sup>10</sup> The rationales for such delegation differed. In its early days the Court preferred the detail-filling rationale, according to which the Court found that Congress could delegate to administrative agency the power to “fill-up” the details in the legislative scheme.<sup>11</sup> The justification for this “fill-up” rationale that became popular in the midst of the progressive era of the 20<sup>th</sup> century was that objectivity and expertise of administrative agencies made delegation desirable.<sup>12</sup> As such, in *Humphrey’s Executor v. United States*<sup>13</sup> the Court stated that the long terms of commissioners on Interstate Commerce Commission were not just permitted but desirable because it allowed the Commissioners to acquire the necessary expertise.<sup>14</sup> The Court likewise noted that Federal Trade Commission allowed the creation of a pool of experts “appointed by law and informed by expertise.”<sup>15</sup>

The Court envisioned only one conceivable limit on the authority of Congress to delegate its lawmaking power to administrative agencies – namely that such delegation

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<sup>9</sup> U.S. Const. Art I, §1

<sup>10</sup> Lisa Schultz Bressman, *Schechter Poultry at the Millennium: a Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1403 (2000) (hereafter Schultz: *Schechter Poultry*).

<sup>11</sup> *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (granting federal courts an authority to adopt their own rules of process); *Buttfield v. Stranahan*, 192 U.S. 470 (1904) (upholding delegation to “establish uniform standards” for importing tea).

<sup>12</sup> *Humphrey’s Executor v. United States*, 295 U.S. 602, 624 (1935).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

follow “an intelligible principle.”<sup>16</sup> Incidentally, the definition of intelligible principle was so vague that only two decisions in the entire history of non-delegation doctrine have ever been stuck down as violating it, and both arose from the same statute – National Industrial Recovery Act (NIRA).<sup>17</sup> In *Panama Refining Co. v. Ryan*,<sup>18</sup> the Court stuck down section 9(c) of the statute, which authorized the president to restrict interstate transportation of oil produced in violation of state law.<sup>19</sup> In *Schechter Poultry Corp. v. United States*,<sup>20</sup> the Court invalidated section 3 of the statute, authorizing President to approve “codes of fair competition” proposed by private industry groups.<sup>21</sup> The Court based its decision in the two cases on the fact that neither section gave the executive any guidance on how to exercise discretion.<sup>22</sup> Furthermore, section 3 of the statute specifically allowed the President to pass the authority to a private industry group to make the standards and then simply approve them without any additional review.<sup>23</sup> The Court viewed that as tantamount to delegating legislative authority to a private group or an individual.<sup>24</sup>

After this brief flirtation with non-delegation, the Court never again invalidated a Congressional delegation of power even where the standards for such delegation were very vague. As such, the proverbial “line in the sand” between the statutes that the Court was willing to strike down and the ones it was willing to enforce was the difference

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<sup>16</sup> *Hampton Jr. & Co v. United States*, 276 U.S. 394, 409 (1928).

<sup>17</sup> *Schultz: Schechter Poultry*, *supra* n. 10 at 140.

<sup>18</sup> 293 U.S. 388 (1935).

<sup>19</sup> *Id.* at 430.

<sup>20</sup> 295 U.S. 495 (1935).

<sup>21</sup> *Id.* at 538-39.

<sup>22</sup> *Id.* at 551 (“The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . .”) (Cordozo, J., concurring).

<sup>23</sup> *Id.* at 541-42.

<sup>24</sup> *Id.* (finding that such delegation to be “utterly inconsistent with constitutional prerogatives...of Congress.”).

between having vague standards and having no standards at all.<sup>25</sup> The willingness of the Court to uphold the very broad and vague delegation of legislative power essentially created two parallel sources of legislation – one administrative and one Congressional.<sup>26</sup> To escape the problems posed by the text of the Constitution, which seemed to expressly prohibit this exact situation,<sup>27</sup> the Supreme Court deemed the exercise of legislative power by the administrative agencies to be quasi-legislative, while labeling the power of Congress legislative.<sup>28</sup> Of course the distinction is meaningless, especially in view of decision in *INS v. Chadha*, which invalidated the one Congressional attempt to establish a real difference between the two systems in the form of a legislative veto.<sup>29</sup> As such under the current non-delegation doctrine the legislative power exercised by the administrative agency is functionally the same as the legislative power of Congress.

The modern rationale for the existence of delegation is primarily practical. The current regime is essential, in the words of Justice Scalia,<sup>30</sup> because of “the functional centrality of delegation in our modern system of government.”<sup>31</sup> Simply stated, without delegation doctrine federal government simply would not be able to function. This

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<sup>25</sup> In *Loving v. United States*, the court upheld a delegation to the President to define what ‘aggravating factors’ would permit the death penalty in court martial without any further guidance. 517 U.S. 748, 768-69 (1996). Similarly in *Mistretta v. United States*, the Court upheld a delegation to the Sentencing Commission to “promulgate sentencing guidelines for every federal criminal offense” without any other guidance. 488 U.S. 361, 371-72 (1989).

<sup>26</sup> See *Amalgamated Meat Cutters & Butcher Workman v. Connally*, 337 F.Supp. 737, 745 (1971) (“There is no analytical difference, no difference in kind, between the legislative function—of prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority conferred by the legislative”).

<sup>27</sup> US Const. Art I, §1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”)

<sup>28</sup> *Humphrey’s Executor v. US*, 295 U.S. 602, 624 (1935); *See also INS v. Chadha*, 462 U.S. 919, 954 n.16 (1983) (noting Court’s use of term “quasi-legislative”).

<sup>29</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>30</sup> A former administrative-law professor himself

<sup>31</sup> *Mistretta v. United States* 488 U.S. 361, 415-16 (Scalia, J., dissenting) (1989).

explanation, however, does little to explain the remarkable vagueness of standards governing delegation.

It was the constitutional and administrative law scholars of all stripes who attempted to provide an explanation. Some like Schoenbrod<sup>32</sup> see delegation as a sign of sick democracy and Congress as abdicating its Constitutional responsibilities.<sup>33</sup> They accuse Congress of intentionally using non-delegation to claim credit for benefits and escape the blame for shortcomings and failings.<sup>34</sup> Schoenbrod likewise claims that Congress deliberately delegates in a ploy to shift the blame for the burdens that legislation imposes, intentionally structures its delegation authority in a way that any administrative action will benefit special interests, and makes delegation so incoherent as to prevent the agency from adopting rules that would burden the industry.<sup>35</sup> Yet others, particularly Mashaw and Schuck argue that delegation does not threaten democracy. Mashaw argues that presidential oversight of agency action ensures democratic accountability, and in fact makes agencies more responsive to democratic pressures.<sup>36</sup> This is so, according to Mashaw, because, as one person, the President is inherently more visible than 435 separate members of Congress, and thus is more accountable for the failing of his administrative state.<sup>37</sup> Shuck claims that agency rulemaking is more responsive to the public interest than Congressional legislation because agencies are more accessible to interest groups and ordinary citizens than members of Congress since the

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<sup>32</sup> David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993) (hereinafter Schoenbrod: *Power Without Responsibility*).

<sup>33</sup> *Id.* at 187.

<sup>34</sup> *Id.* at 16.

<sup>35</sup> *Id.*

<sup>36</sup> Jerry L. Mashaw, *Greed, Chaos, & Governance* 132 (1997).

<sup>37</sup> *Id.*



costs of participation are much lower.<sup>38</sup> Further, agency heads are not dependent on campaign donations for their continued employment, which, in turn, reinforces their relative imperviousness to industry pressure.<sup>39</sup>

Scholarly debate notwithstanding, it is clear that non-delegation doctrine in general faces significant problems. These problems are even more acute in the context of immigration and alienage law, where plenary power doctrine allows delegation of unprecedented amount of power to administrative agencies. I will now turn to the discussion of plenary power of Congress over immigration and alienage law and its unique relationship with the delegation doctrine.

#### Section B: *Sources and dimensions of plenary power*

The Supreme Court once remarked that “over no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens].”<sup>40</sup> This pronouncement best captures the scope and the breath of power that Congress exercises over immigration and alienage regulation. Remarkably, the doctrine of plenary power showed little signs of fading since its introduction at the end of 19th century, and remains as potent today as it its inception in 1889.<sup>41</sup> Interestingly, while the breath of plenary power doctrine has rarely been questioned<sup>42</sup> the exact Constitutional source of its legitimacy remains unclear. The sources often cited include the actual text of the

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<sup>38</sup> Peter H. Schuck, Delegation and Democracy: Comments on David Schoenbrod, 20 Cardozo L. Rev. 775, 783-90 (1999).

<sup>39</sup> *Id.*

<sup>40</sup> *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

<sup>41</sup> Hiroshi Motomura, Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 Yale L.J. 545, 554 (1990) (hereinafter Motomura: Phantom Norms).

<sup>42</sup> See e.g., Justice Jackson’s dissent in *Shaughnessy v. United States ex. Rel. Mezei*, 354 U.S. 206, 224 (1953) (arguing for more substantial due process than what was granted under the banner of plenary power doctrine).

Constitution,<sup>43</sup> foreign commerce power,<sup>44</sup> and the dubiously named inherent sovereignty principle,<sup>45</sup> also sometimes referred to as extra-constitutionality principle.<sup>46</sup>

Despite uncertain origins, however, Constitutional dimensions of plenary power have been well established. As such, while the *Chinese Exclusion Case*<sup>47</sup> stands for proposition that federal government is unconstrained in its discretion regarding categories for the admission of aliens,<sup>48</sup> in *Nashumura Ekiu v. United States*,<sup>49</sup> the Court extended the purview of plenary power to cover procedures for enforcing admission criteria entrusted to agency officials.<sup>50</sup> In *Fong Yue Ting v. United States*,<sup>51</sup> the Court applied plenary power doctrine in the context of deportation of aliens, holding that deportation did not constitute punishment for the purposes of due process of the 5th amendment, and thus was immune from judicial review.<sup>52</sup> Ominously stating that “whatever procedure authorized by Congress is, it due process as far as an alien denied entry is concerned,” the Court further “clarified” the due process requirements for aliens detained at the border in

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<sup>43</sup> U.S. Const. Art I §8 cl. 4 (“Congress shall have power...[t]o establish an [sic] uniform rule of Naturalization.”)

<sup>44</sup> In perhaps the earliest formulation of what was to become plenary power doctrine the Court in 1884 *Head Money Case* upheld a federal statute imposing tax on owners of vessels that transported foreign passengers into the US, holding that transportation of foreign passengers was “part of commerce with foreign nations.” 112 U.S. 580 (1884).

<sup>45</sup> Responding to the challenge to Congressional law banning immigration of Chinese laborers, including those who have previously been admitted into the U.S, the Supreme Court in *Chinese Exclusion Case* stated that any attempt to restrict congressional power to exclude aliens would be a diminution of the sovereignty of the United States. 130 U.S. 581 (1889).

<sup>46</sup> The principle was articulated in a case of *Curtis-Wright*, where the Supreme Court stated that the idea of federal government as a government of limited power was only accurate in the context of internal affairs because those powers were taken from the realm of powers that originally belonged to the individual states or colonies. However, because foreign affairs powers, including immigration were never the states’ to begin with (having passed directly from the English Crown to the colonies as a whole) and thus were “extra-constitutional.” 29 U.S. 304 (1936).

<sup>47</sup> 130 U.S. 581 (1889).

<sup>48</sup> *Id.* at 604 (“United States, in their relation with foreign countries and their subjects...[is] invested with powers...the exercise of which can be invoked for the maintenance of its absolute independence and security.”)

<sup>49</sup> 142 U.S. 651 (1892).

<sup>50</sup> *Id.* at 660.

<sup>51</sup> 149 U.S. 698 (1893).

<sup>52</sup> *Id.* at 715.

*Knauff v. Shaughnessy*<sup>53</sup> and substantive categories for deportation in *Harisiades v. Shaghnessy*.<sup>54</sup>

Overall, Congressional power over immigration law, especially in the context of delineating admission categories for aliens has been virtually unconstrained in its discretion. I shall now turn to the discussion of the consequences and application of the plenary power to delegation in intra-federal and federal-to-state contexts, using employment of non-citizens (an alienage law issue) as, hopefully, a representative example of the general delegation regime.

Section C – *Delegation of immigration and alienage power to administrative agencies in intra-federal context*

The power of Congress to delegate its legislative authority to administrative agencies in the context of alienage law has seen very few limits. This, of course, is unsurprising, given the Court's view of the plenary power doctrine as a guiding principle of immigration and alienage law.<sup>55</sup> The restrictions on hiring of non-citizens in federal government, both far-reaching and comprehensive, may serve as a good illustration of this general principle. The restrictions begin with Congress<sup>56</sup> and the President,<sup>57</sup> and end up affecting virtually every level of federal government.<sup>58</sup> The reason for this is because

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<sup>53</sup> 338 U.S. 537 (1950).

<sup>54</sup> 342 U.S. 580 (1952). The court did grant limited due process safeguards in *Yamataya v. Fisher*, however for those aliens who are located inside the United States. 189 U.S. 86 (1903).

<sup>55</sup> See Section B, *infra*

<sup>56</sup> In fact every appropriation bill since 1939 had Congressional ban on employing certain non-citizens in federal positions within continental United States, with each agency having responsibility apply the law, Office of Personnel Management, Memorandum on Federal Employment of Non-Citizens, at <http://www.opm.gov/employ/html/Citizen.htm>

<sup>57</sup> Executive Order 11935 (September 2, 1976) restricts the employment of non-citizens into "competitive service" positions covered by Title 5 of the U.S. Code. This applies to all agencies with competitive service positions, any place in the world.

<sup>58</sup> Office of Personnel Management, Memorandum on Federal Employment of Non-Citizens, at <http://www.opm.gov/employ/html/Citizen.htm> (noting that implementing policies prescribed by Congressional ban on hiring of non-citizens is responsibility of each individual agency).

Congress gave the President authority to regulate executive branch employees, and delegated broad rule-making power to the Office of Personnel Management (“OPM”).<sup>59</sup> Pursuant to that authority OPM, in conjunction with the executive order 11935, barred admission into federal civil service of non-citizens as a way to “best promote the efficiency of the service.”<sup>60</sup>

In *Hampton v. Mow Sun Wong*,<sup>61</sup> the Supreme Court upheld the principle of such delegation, holding that presidential authorization would be sufficient to justify certain hiring restrictions.<sup>62</sup> Individual agency regulations precluding employment of non-citizens who were not permanent residents were likewise upheld for constitutionality, although remanded to see if they were within statutory authorization.<sup>63</sup> The only obvious limitation on the agency’s discretion to discriminate appears to be the Court’s insistence that there is a legitimate basis to presume that discriminatory rule thus promulgated was intended by Congress to serve that interest.<sup>64</sup> Importantly, however, the Court in *Hampton* stuck down a Civil Service Commission regulation barring aliens in federal employment,<sup>65</sup> demonstrating that the usual deference the Court accorded to agency’s discretion would be stripped if exercised improperly. The Court noted that because the Commission had “no responsibility for foreign affairs...establishing immigration quotas or conditions of entry, or naturalization process” it operated outside the purview of

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<sup>59</sup> 5 U.S.C. § 5115. Congress, however, retains significant authority over the terms and conditions of federal employment. See 5 U.S.C. pt. III.

<sup>60</sup> 5 U.S.C.A. §3301(f)

<sup>61</sup> 426 U.S. 88 (1976).

<sup>62</sup> *Id.* at 104-105 (“[petitioners] correctly state that the need for undivided loyalty in certain sensitive positions clearly justifies a citizenship requirement in at least some parts of the federal service, and that the broad exclusion serves the valid administrative purpose of avoiding the trouble and expense of classifying those positions which properly belong in executive or sensitive categories.”).

<sup>63</sup> *Toval v. U.S. Postal Service*, 3 F.3d. 1271 (1993).

<sup>64</sup> *Id.* at 1278.

<sup>65</sup> 426 U.S. 188, 116-17 (1976)

authority given to it by Congress,<sup>66</sup> underscoring the point that the potency of the authority delegated pursuant to the plenary power doctrine had to be tempered by a sound decision-making process.

The *Hampton* decision was not an isolated case. The Court had consistently shown its willingness to scrutinize agency interpretation arising out of Congressional delegation where rights of aliens were concerned. In a whole series of cases preceding *Hampton*, the Court in *Bridges v. Waxon*,<sup>67</sup> *Fong Haw Tan v. Phelan*,<sup>68</sup> *Wong Yang Sung v. McGrath*,<sup>69</sup> *Kwong Hai Chew v. Colding*,<sup>70</sup> and *Woodby v. Immigration and Naturalization Service*<sup>71</sup> read statutes authorizing administrative restrictions on aliens narrowly, repeatedly construing the statutes in favor of aliens.<sup>72</sup> In his article detailing these cases<sup>73</sup> Professor Hiroshi Motomura argues that a possible explanation for the Court's behavior was the influence of "phantom constitutional norms" – real constitutional norms coming from a mainstream public law that the Court could not directly apply in interpreting immigration statutes because of the plenary power

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<sup>66</sup> *Id.* at 114.

<sup>67</sup> 326 U.S. 135 (1945) (overturning the deportation of a union activist Harry Bridges under the statute authorizing deportation on grounds such as membership and affiliation with organizations that teach the overthrow of the United States Government by force; noting the harsh consequences of deportation, despite the Courts own refusal to equate deportation with criminal punishment).

<sup>68</sup> 333 U.S. 6, 7 (1948) (holding that, given harsh consequences of deportation, statutes and regulations that are ambiguous on exact grounds for deportation must be read in light most favorable to the aliens).

<sup>69</sup> 339 U.S. 33 (1950) (holding that a combination of adjudicative and prosecutorial roles by immigration inspectors in some deportation cases conflicted with the Administrative Procedure Act's ("APA") separation-of-functions provisions, despite the fact that by its terms APA only applied to "adjudication required by the statute," and there was little indication, outside the court's own insistence, that a deportation hearing was so required.)

<sup>70</sup> 344 U.S. 590 (1953) (overturning the government's denial of entry to Chew, a returning permanent resident, without a hearing and as prejudicial to public interest, holding the authorizing statute's provisions allowing denial of admission without a hearing not applicable to Chew).

<sup>71</sup> 385 U.S. 276 (1966) (requiring that standard of proof the government must meet in deportation proceeds was "clear...convincing evidence" rather than "preponderance of evidence, as the government had suggested claiming that such a reading was consistent with what the Congress intended when passing the statute.)

<sup>72</sup> Motomura: Phantom Norms, *supra* n. 41, at 573.

<sup>73</sup> Motomura: Phantom Norms, *supra* n. 41, at 567-73.

doctrine.<sup>74</sup> I believe that an alternative or, perhaps, concurrent explanation stems from the Court's general concern over vague and overbroad Congressional delegation of the legislative power to administrative agencies in the context of plenary power doctrine – a kind of “phantom non-delegation doctrine with teeth,” where the Court, unwilling or unable to deal with the failings of non-delegation doctrine directly, instead turned to scrutinizing agency interpretation as a way to alleviate its concerns.

#### Section D – *Delegation of immigration and alienage powers to the states*

In a general context of federalism, the principles of concurrent powers presuppose that States can act within their police powers unless preempted by Congress pursuant to a valid constitutional delegation such as immigration power.<sup>75</sup> As such, Congress can empower the states to act by either direct delegation or by withholding the exercise of its power.<sup>76</sup> The primary vehicle for Congress to delegate its powers to the states consists of allowing or authorizing state action in aid or supplementary to federal legislation.<sup>77</sup> Examples include the Congressional delegation of authority to define elements of federal crime,<sup>78</sup> conforming federal land requirements to local and state laws,<sup>79</sup> and making it a federal crime to violate a state wildlife statute.<sup>80</sup> One circuit court went as far as to say

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<sup>74</sup> Motomura: Phantom Norms, *supra* n. 41 at 573.

<sup>75</sup> See e.g., Joshua D. Sarnoff, Cooperative Federalism, the Delegation of Federal Power and the Constitution, 39 Ariz. L. Rev. 205, 226 (1997).

<sup>76</sup> *Id.*

<sup>77</sup> *Kramer v. United States* 245 U.S. 478 (1918).

<sup>78</sup> *United States v. McKenzie*, 99 F.3d 813 (7<sup>th</sup> Cir. 1996) (allowing states to define elements of federal crime, in penalizing possession of a firearm by a person convicted of federal crime, in penalizing the possession of a firearm by a person convicted of a crime punishable by imprisonment for a term exceeding one year).

<sup>79</sup> *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905) (“It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principle agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully entrust to the local legislature the determination of minor matters respecting the disposal of these lands.”).

<sup>80</sup> *United States v. Guthrie* 50 F.3d 936 (11<sup>th</sup> Cir. 1995) (allowing a federal statute that makes it unlawful to deal in any fish or wildlife taken in violation of any state law or regulation, holding that such a statute does not represent a true delegation of Congressional power).

that non-delegation issues are not implicated at all where Congress delegates power to the states, insofar as such delegation is consistent with the principles of federalism.<sup>81</sup>

In this permissive environment, the early history of state regulation of alienage law may serve as a useful example. Historically, in the absence of federal legislation, state regulation of employment of non-citizens has been marked by blatant racism, discrimination and prejudice. In *Heim v. McCall*<sup>82</sup> the Supreme Court upheld the lower court's decision that labor law prohibiting employment of aliens on public works contracts was valid because the state was deemed to have the same right to discriminate in hiring as a private individual.<sup>83</sup> The tide has turned in the second part of the 20<sup>th</sup> century, as courts began to increasingly scrutinize states' discrimination of aliens, holding that such discrimination must be justified by a compelling state interest and be narrowly tailored to its avowed goal.<sup>84</sup>

The courts had followed two primary rationales in overturning these state statutes: (1) violations of equal protection of the 14<sup>th</sup> amendment,<sup>85</sup> and (2) conflicts with the federal scheme occupying the field or preemption.<sup>86</sup> The two seminal cases breaking new

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<sup>81</sup> Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc., 20 F.3d 1406 (6th Cir. 1994).

<sup>82</sup> 88 Misc. 291 (1915), affirmed 239 U.S. 175 (1915).

<sup>83</sup> *Id.* at 194. See also *Rok v. Legg* 27 F. Supp. 243 (1939), *Aron v. Leavy* 219 Cal. 456 (1933), *Lee v. Lynn* 223 Mass 109 (1916), *People v. Crane*, 214 NY 154 (1915).

<sup>84</sup> *Sugarman v. Dougall*, 413 U.S. 634 (1973).

<sup>85</sup> *Purdy & Fitzpatrick v. State* 71 Cal. 2d 566 (1969) (holding to be denial of the equal protection of the law statutory provisions prohibiting the employment of aliens in public works); See e.g., *Moham v. Parks*, 352 F. Supp. 518(1973) (invalidating the ordinance restricting municipal employment to citizens of United States); *Miranda v. Nelson*, 351 F. Supp. 735 (1972) (invalidating Arizona statute preventing non-citizens from being employed upon or in connection with any state, county or municipal work or employment); *Orlando v. Florida*, 751 F. Supp. 974 (1990) (holding Florida statutes requiring public employees to take a loyalty oath that recites that employee is a citizen of the state and imposes immediate sanction and discharge on employees who fail to take oath to be a facially unconstitutional restraint of freedom of legal aliens to obtain public employment); *Fernandez v. Georgia*, 716 F. Supp 1475 (1989) (holding that George statute restricting opportunity to become state trooper to native-born U.S. citizens to violate the rights of equal protection of foreign born naturalized applicants).

<sup>86</sup> *Teitscheid v. Leopold* 342 F. Supp. 299 (1971) (invalidating state law prohibiting employment of aliens on both 14<sup>th</sup> amendment and supremacy clause grounds, holding that such law served no compelling state

ground on the issue were *Takahashi v. Fish and Game Commission*<sup>87</sup> and *Graham v. Richardson*.<sup>88</sup> In *Takahashi* the Court struck down a statute that denied fishing licenses to non-citizens, holding that lawful admittance into the country entitled aliens to equal protection under state laws.<sup>89</sup> In *Graham* the Court deemed classifications based on alienage to be subject to strict judicial scrutiny because non-citizens constituted a discrete and insular minority.<sup>90</sup>

Nonetheless, not all state regulation of non-citizen employment has been restricted. The Court viewed restrictions on certain jobs as acceptable because those jobs served a primarily political function, and subjected such restriction to a much more deferential rational level of review.<sup>91</sup> Jobs such as probation officers,<sup>92</sup> school teachers,<sup>93</sup> and state troopers<sup>94</sup> can thus be restricted to citizens only, although, for no clear reason, jobs such as lawyers<sup>95</sup> cannot. Furthermore, and perhaps far more importantly, the Court proved to be far more sympathetic to state regulation of alienage and immigration law where it viewed implicit Congressional acquiescence as a possible justification.

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interest and denial of work clearly created burden on aliens that Congress did not anticipate, impinging on federal immigration process.

<sup>87</sup> 334 U.S. 410 (1948).

<sup>88</sup> 403 U.S. 365 (1971).

<sup>89</sup> *Takahashi*, at 419-420.

<sup>90</sup> *Graham*, at 371-72 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938)).

<sup>91</sup> *Cabell v. Chavez-Salido*, 454 U.S. 432, 433, 439 (1982).

<sup>92</sup> *Id.* (holding that State statutes requiring that state's "peace officers", including deputy probation officers in particular be US citizens are constitutional).

<sup>93</sup> *Ambac v. Norwick*, 441 U.S. 68, 80-81 (1979) (noting that state barring non-citizens from serving as public teaches is subject to rational basis review only).

<sup>94</sup> *Foley v. Connelie*, 435 U.S. 291, 293, 300 (1978) (prohibiting non-citizens from serving as state troopers serves a rational purpose).

<sup>95</sup> In *Re Griffiths*, 413 U.S. 717 (1973) (holding Connecticut's exclusion of aliens from the practice of law violates the Equal Protection Clause of the Fourteenth Amendment).



As such in *De Canas v. Bica*,<sup>96</sup> the Supreme Court upheld California statute penalizing employees for hiring illegal immigrants, reasoning that not all state laws affecting non-citizens constitute attempts to regulate immigration. The court established a three prong test to determine the constitutionality of state legislation: (1) state law may not regulate immigration; (2) even if the statute did not regulate immigration it may still be overturned if Congress explicitly stated its intent to occupy the field in such a way that “complete[ly] oust[ed]”<sup>97</sup> state power, and (3) the state law cannot serve as an “obstacle” to the federal immigration policies.<sup>98</sup>

Section E: *Structural bias as a possible explanation for differences in judicial treatment of Congressional delegation in intra-federal and federal-to-state contexts.*

The remarkably deferential treatment afforded to federal restrictions on employment of non-citizens points to a very definite structural bias in the courts’ thinking when compared to the high scrutiny similar restrictions receive in the state context. This bias consists of an underlying presumption that while plenary immigration power imposes few limits on federal authority to discriminate, the question of whether such power could be delegated to the states, not to mention be exercised in absence of Congressional declaration, is far from settled.<sup>99</sup>

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<sup>96</sup> 424 U.S. 351, 355 (1976) (“The Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.”).

<sup>97</sup> *Id.* at 356-58 (The evidence of such ouster can be shown by either legislative history or the text of the statute.).

<sup>98</sup> *Id.* at 363-65.

<sup>99</sup> See Michael W. Loudenslager, *Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause*, 17 B.Y.U. J. Pub. L. 191, 207, 310 (suggesting that the issue of whether plenary power of the states could be delegated had not been settled by the Supreme Court, arguing that no such delegation is possible) (hereinafter Loudenslager: *State Interests and Federalism*).

The source of structural bias affecting the analysis of the constitutionality of state alienage classifications begins with the two decisions the Supreme Court reached in *Graham v. Richardson*<sup>100</sup> and *Mathews v. Diaz*.<sup>101</sup> In *Graham* the Court held that a state classification based on alienage is subject to strict scrutiny under the Equal Protection Clause,<sup>102</sup> while in *Mathews* the Court found that the same classification if done by federal government is subject only to rational basis of review.<sup>103</sup> The doctrinal confusion that ensued following these two decisions concerned the level of review the courts should apply in situations where the states are carrying out an explicit Congressional policy. If the resulting classifications are seen as incidents of federal policy, seemingly the deferential rational basis of review in *Mathews* should apply. But what about the *Graham* dicta which evidences the Court's constitutional concern that the uniformity requirements in the Naturalization Clause prohibit the federal government from authorizing the states to adopt divergent policies affecting aliens?<sup>104</sup>

Recently two courts have reached cardinally different results on this very issue, with the New York Court of Appeals deciding in *Aliessa v. Novello*<sup>105</sup> that Congress may not delegate its plenary immigration power to the states thus leaving state's classification of aliens subject to strict scrutiny under *Graham*,<sup>106</sup> whereas in *Soskin v. Reinertson*, the

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<sup>100</sup> 403 U.S. 365 (1971).

<sup>101</sup> 426 U.S. 67 (1976).

<sup>102</sup> *Graham* at 371-72.

<sup>103</sup> *Mathews* at 82-83.

<sup>104</sup> “[U]nder Art.I, §8, cl 4, of the Constitution, Congress’ power is to establish an uniform Rule of Naturalization.” *Graham*, at 382 (citing *Shapiro v. Thompson*, 394 US 618, 641 (1969)) The often quoted Court’s pronouncement in *Graham* that “Congress does not have the power to authorize the individual States to violate the Equal Protection Clause,” is of less concern since it does not directly contradict the decision in *Mathews*. *Id.* Instead this pronouncement assume conclusion to a question of what level of scrutiny the courts should afford to the determination of whether a federally authorized state alienage classification violate the Equal Protection Clause. *Id.* See also, *Developments in Law – Jobs and Borders*, 118 Harv. L. Rev. 2247, 2253 (2005).

<sup>105</sup> 754 N.E.2d 1085 (N.Y. 2001).

<sup>106</sup> *Id.* at 1095.

Tenth Circuit explicitly rejected *Aliessa*, in upholding a Colorado statute's alienage classifications, finding the appropriate standard of scrutiny to be rational basis in *Mathews*.<sup>107</sup>

In *Aliessa* the state of New York administered a state-funded supplemental Medicaid program that provided benefits to individuals whose incomes did not qualify for Federal Medicaid but fell below the statutorily defined "standard of need."<sup>108</sup> Following the passage of PRWORA,<sup>109</sup> the state eliminated this supplemental coverage for qualified aliens under the five-year bar who had arrived after PRWORA's enactment, thus making alien eligibility the same as in federal Medicaid program.<sup>110</sup> New York State Court of Appeals, responding to the equal protection challenge by *Aliessa* plaintiffs, held the state statute unconstitutional,<sup>111</sup> explicitly relying on *Graham's* dicta referencing "explicit constitutional requirement of uniformity."<sup>112</sup> The Court reasoned that allowing New York to determine for itself the extent to which it can discriminate against aliens would be a direct contravention of the uniformity requirement of Naturalization clause, as it would potentially create wide variation among the states regarding alien's eligibility to welfare.<sup>113</sup> Since Congress was not allowed to delegate plenary power in such a way as to violate the Naturalization clause, the state's alienage classification was without Congressional authorization and thus warranted strict scrutiny under *Graham*.<sup>114</sup>

In *Soskin* the state of Colorado had decided to continue to provide federal Medicaid coverage to qualified aliens even though § 1612 of PRWORA authorized the

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<sup>107</sup> 353 F.3d 1242, 1255 (10<sup>th</sup> Cir. 2004).

<sup>108</sup> *Aliessa*, 754 N.E.3d at 1089.

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1096-98.

<sup>112</sup> *Id.* at 1097 (quoting *Graham v. Richardson*, 403 U.S. 365, 382 (1971)).

<sup>113</sup> *Id.* at 1098.

<sup>114</sup> *Id.* at 1095.

state to deny such coverage.<sup>115</sup> However in 2003, due to large deficits, the state legislature reversed its decision, limiting its coverage to what PRWORA required.<sup>116</sup> Responding to the plaintiffs' Equal Protection Challenge, the Court stated that Congress was empowered to pursue national policy stated in PRWORA, and that the state's refusal to provide optional benefits was in line with Congressional concern (and not just state concern) that "individual aliens not burden the public benefit system."<sup>117</sup> The court directly rejected *Aliessa* non-uniformity analysis, stating that uniformity concerns were misplaced because both the states were not given unlimited discretion,<sup>118</sup> and that reliance on Naturalization clause as a source of Congressional authority was erroneous because Naturalization clause was not the only source of immigration power, and that distribution of welfare benefits bore no direct relationship to the naturalization process.<sup>119</sup>

It is evident that the outcome of these two cases is the direct consequence of the structural bias running through the courts' decisions, namely the assumption that the nature of intra-federal delegation of plenary power is somehow fundamentally different from federal-to-state delegation. While the results the courts had reached in *Aliessa* and *Soskin* were cardinally different, both courts showed the same bias - viewing the nature and the extent of Congressional delegation of plenary power to state entities as fundamentally different from intra-federal delegation. In the remainder of this paper I reject this structural bias, arguing that nothing in either history or sources of plenary power precludes Congressional delegation to both federal agencies and state governments on an equal footing as long as the extent of that delegation is made explicit.

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<sup>115</sup> 353 F.3d. 1242, 1246. (10<sup>th</sup> Cir. 2004).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (quoting 8 U.S.C. §1601(4) (2000)).

<sup>118</sup> *Id.* at 1255.

<sup>119</sup> *Id.* at 1256.

## **Part II: Explicit Delegation and the Need for the Rule of Uniformity**

Section A: *The case for explicit delegation and the search for doctrinal consistency.*

The present state of non-delegation doctrine in immigration and alienage law leaves much to be desired. Perhaps one of the most acute problems with the current state of affairs is the crisis of legitimacy that arises from the combination of broad Congressional delegation to federal agencies and the plenary power Congress wields on this issue. The consequence is that, given judicial unwillingness to enforce non-delegation, Congress is basically siphoning its legislative power to other branches in the context where its power is at its peak, and virtually unchecked by judicial review.<sup>120</sup> Imagine if Congress decided to delegate its power to declare war to an individual state, or to one particular member of the executive branch!

The problem is symptomatic of the current state of non-delegation doctrine as a whole. The disconnect between the principle of *non*-delegation from which the doctrine derives its name, and the practical reality of having essentially two parallel legislative systems – one Congressional and one administrative, creates a serious crisis of legitimacy within the Federal government. If non-delegation doctrine truly mandates that Congress cannot siphon off its legislative power to other branches then all three branches of governments are involved in a massive constitutional violation of immense proportions. The entire administrative state is basically a constitutional abomination, where Congress is abdicating its constitutional duty to legislate, administrative agencies are exercising

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<sup>120</sup> See *Amalgamated Meat Cutters & Butcher Workman v. Connally*, 337 F. Supp. 737, 745 (1971) (“There is no analytical difference, no difference in kind, between the legislative function—of prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority conferred by the legislative.”).

authority they don't have, and the judiciary is letting them to get away with it. The crisis of legitimacy is heightened in the immigration context, given the stakes and magnitude of the power involved, where the tension between the need for delegation and the importance of controlling the scope of this delegation is particularly acute.

Of course it would be madness to deny the practical need for the administrative state, especially in the context of immigration and alienage law. Massive administrative bureaucracy is essential to handle the inflow of immigrants, their registration, naturalizations and processing of their applications.<sup>121</sup> We need administrative agencies to process visas abroad, decide who comes and goes of the country, and have access to intelligence to weed out potential security threats. Furthermore, we need agencies that can act quickly on potential security threats arising in immigration context – a function for which a bi-cameral processes of legislation is ill-suited.

The tension between the need for delegation and the importance of controlling its scope is equally high in the context of delegation of the federal alienage power to the states. The federal government often needs state assistance and expertise in distribution of social services and welfare benefits to immigrants. If we enforce the non-delegation of immigration power too rigidly, the states would not be able to implement their own programs in helping immigrants in ways that go beyond the “floor” of federal assistance, thus dramatically affecting thousands if not hundreds of thousands of immigrants depending on such benefits.

A new approach is needed to reconcile the doctrinal underpinnings of non-delegation doctrine in immigration and the practical realities of non-enforcement of this

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<sup>121</sup> For example, Homeland Security processed over 13 million US citizens and 21 million aliens in the month of September 2004 alone. Fiscal Year End Statistical Reports, *at* <http://uscis.gov/graphics/shared/statistics/publications/msrsep04/index.htm>.

doctrine. This doctrine should be able to address the concerns that critics have with the current doctrine,<sup>122</sup> and yet retain sufficient flexibility for the administrative state to function. As such the doctrine will first preserve the functionality of the administrative state, acknowledging the value of expertise and deliberation inherent in agency decisions, and the reality of the need for agency delegation given the sheer scale and volume of necessary regulation. Second, it will ensure greater Congressional accountability by requiring that delegation be explicit, and forcing Congress to specify the exact dimensions of its delegation authority.

I draw on the principles articulated by Professor Thomas W. Merrill (who calls it exclusive delegation) in his article proposing the creation of a new delegation doctrine<sup>123</sup> to argue that establishment of a new explicit delegation doctrine in the context of immigration and alienage law may be able to solve some of the structural problems and biases I outlined earlier. Explicit delegation doctrine consists of two principles: anti-inherency and transferability. Anti-inherency simply means that judicial and executive officials will have no inherent authority to act with the force of law, unless they can trace such authority to some provision of enacted law. Transferability means that Congress has power to vest executive and judicial officers with authority to promulgate legislative regulations functionally identical to the statutes. Adoption of these two principles would ensure that Congressional delegation is explicit in its form, clearly articulating the scope

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<sup>122</sup> Merrill: Exclusive Delegation, *supra* n.6. See also discussion regarding the crisis of legitimacy surrounding the current non-delegation doctrine above and again in Part I, Section A of this paper.

<sup>123</sup> Merrill: Exclusive Delegation, *supra* n.6. at 2101 (arguing for a new exclusive system of delegation to correct past problems). My decision to change the name of the doctrine from exclusive to explicit reflects my belief that the principle benefit of this doctrine would be the clarity it would provide in delineating authority granted to administrative agencies and state governments).

of the power being delegated (transferability), and the authority to which this power is being delegated to (anti-inherency).

#### Section B: *Benefits of explicit delegation*

I believe that the principle benefit of the explicit delegation doctrine is that it provides a coherent theoretical foundation for a practice in which Congress, the judiciary and the executive branch are already involved. The cardinal difference lies not in the scope of powers Congress can delegate but in the way Congress describes those powers. In this context explicit delegation may placate critics of weak non-delegation doctrine who see it as a loophole for Congress to abdicate its constitutional and democratic responsibility for making policy choices. Indeed, explicit delegation's first principle of anti-inherency makes it harder for Congress to disclaim responsibility, since for Congress to vest federal agency or a state with the power they need, Congress must explicitly delegate the authority to act legislatively and precisely delineate the scope of authority to be exercised. As such, monitoring and control of Congressional delegation would be more clearly on display, and thus would make it more accountable for policy choices that it makes.

Explicit delegation may also better promote the role of checks and balances in the federal government, as well as in the larger context of federalism.<sup>124</sup> Critics of current non-delegation doctrine assert that one of its weaknesses is that it encourages Congress to give away too much power to the executive – creating a dangerous strain on the system of checks and balances.<sup>125</sup> Explicit delegation doctrine's principles of anti-inherency and transferability, however, help to ensure that such siphoning of democracy does not

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<sup>124</sup> Merrill: Exclusive Delegation, *supra* n.6 at 2100.

<sup>125</sup> See e.g., David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993) (proposing strict non-delegation doctrine as a way to police abuses in government)



happen, forcing delegation to be couched in terms that are both specific and definite. Given the institutional reluctance of any branch of government to give away too much of its power in favor of another branch and the fact that Congress cannot delegate power to itself in avoidance of bicameralism and presentment<sup>126</sup> – Congress will have an inherent incentive to carefully regulate how much power it delegates to other branches and states, as well as a powerful defense against any unauthorized grab of power (anti-inherency principle). Finally, explicit delegation, by the virtue of transferability principle, allows the same degree of flexibility and efficiency as weak non-delegation. It preserves the administrative state and federal-to-state delegation, only asking for a specific grant of authority in return.

Section C: *Explicit delegation and constitutional sources of its two guiding principles: transferability and anti-inherency*

In his article Professor Merrill establishes two guiding principles framing the new doctrine: anti-inherency and transferability. The anti-inherency principle states that judicial and executive officials have no inherent authority to act with the force of law and must always trace such authority to some provision of enacted law.<sup>127</sup> Support for anti-inherency principle in the Constitution can be traced all the way back to the *Youngstown* decision,<sup>128</sup> where Justice Jackson in his famous concurrence established the tripartite analysis of executive power.<sup>129</sup> There Justice Jackson stated that Presidential and thus the executive power is at its peak where President acts pursuant to an express or implied authorization of Congress, and his power is at its lowest ebb where President takes

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<sup>126</sup> *I.N.S. v. Chadha*, 462 U.S. 919 (1983).

<sup>127</sup> Merrill: Exclusive delegation, *supra* n.6 at 2101.

<sup>128</sup> 343 U.S. 579 (1952).

<sup>129</sup> *Id.* at 588. (1952).

measures incompatible with the express or implied will of Congress.<sup>130</sup> The twilight zone of presidential authority, according to Jackson, lay in the middle where Congress has not spoken and the president could only rely on his own independent powers (whatever they may be).<sup>131</sup>

In immigration context, given the plenary power of Congress in immigration and alienage matters, the independent authority of the executive branch seems somewhat diminished outside explicit Congressional authorization, considerably shrinking the “twilight zone”. Possible exceptions may include incidents where President’s control over immigration is moored less in Congressional authorization and more in independent sources of authority stemming from the emergency powers of the president.<sup>132</sup>

The transferability principle states that Congress has the power to vest executive and judicial officers with authority to promulgate legislative regulation functionally identical to the statutes.<sup>133</sup> The concept of transferability is nothing new and hasn’t been in doubt, at least when it comes to questions of intra-federal delegation. As such, in *United States v. Gramaud*<sup>134</sup> Congress authorized an agency to promulgate rules that were enforced by criminal sanctions. In *Mistretta v. United States*,<sup>135</sup> the court said as much explicitly – “rulemaking power originates in the Legislative Branch and becomes an executive function only when delegated by the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch.”<sup>136</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Merrill: Explicit Delegation, *supra* n. 6 at 2101.

<sup>134</sup> 110 U.S. 506, 521 (1911).

<sup>135</sup> 488 U.S. 361 (1989).

<sup>136</sup> *Id.* at 386 n.1

In terms of delegation of immigration power from Congress to the states, the issue is more complicated. At least one state supreme court<sup>137</sup> and some critics<sup>138</sup> charge that Congress may not delegate immigration power to the states since that would violate the uniformity requirement of Naturalization Clause<sup>139</sup> of the Constitution.<sup>140</sup> More specifically, they allege that the whole concept of plenary power is predicated on the notion of uniformity that framers sought to grant to Congress as a way to prevent each state from adopting its own rules of immigration.<sup>141</sup> The problem with this criticism however is that it suffers from a fallacy of overgeneralization. While the reasoning is sound when it is applied to the immigration law that deals with the actual processes of naturalization given that the Naturalization Clause,<sup>142</sup> when read in conjunction with Necessary and Proper Clause,<sup>143</sup> allows Congress to make rules relating to the procedural and substantive process of naturalization itself.<sup>144</sup> However, the scope of the Naturalization Clause with its attendant uniformity requirement must be read narrowly; leaving questions of treatment of aliens in alienage law contexts such as access to public

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<sup>137</sup> *Aliessa v. Novello*, 754 N.E.2d 1085, 1094-95, 1098 (N.Y. 2001).

<sup>138</sup> *See e.g.*, Loudenslager: State Interests and Federalism, *supra* n.99, at 297 (arguing that Congress may not delegate to the states the power that the states would not be able to exercise because of the 14<sup>th</sup> amendment in absence of such delegation).

<sup>139</sup> U.S. Const. Art. I, § 8, cl. 4 (stating that Congress shall have power "[t]o establish an uniform Rule of Naturalization").

<sup>140</sup> Loudenslager: State Interests and Federalism, *supra* n.99, at 314.

<sup>141</sup> *Id.*

<sup>142</sup> U.S. Const. Art. I, § 8, cl. 4 (stating that Congress shall have power "[t]o establish an uniform Rule of Naturalization").

<sup>143</sup> U.S. Const. Art. I, § 8, cl. 19 (stating that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution...all other Powers vested by this Constitution in the Government of the United States.").

<sup>144</sup> *See Chadha v. I.N.S.*, 634 F.2d 408, 418 (9th Cir. 1980) ("[T]he Naturalization Clause, when read in conjunction with the Necessary and Proper Clause, gives Congress considerable power over aliens." (citations omitted) (citing *Fiallo v. Bell*, 430 U.S. 787, 792-95 (1977))); *see also Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

services, jobs and other benefits outside the scope of the clause and thus subject to delegation unconstrained by the uniformity requirement.<sup>145</sup>

There are two additional reasons why the scope Naturalization Clause should be read narrowly. First, historically the purpose of the Naturalization Clause was to curb potentially dangerous consequences of having states with divergent naturalization rules in light of the Comity Clause in the Articles of Confederation (similar to privileges and immunities clause)<sup>146</sup>. Prior to the adoption of the Naturalization Clause, an alien could forum shop from one state to another until he (and in those times it was invariably he) got the favorable determination, which was then binding on every other state.<sup>147</sup> Second, the uniformity requirement does not explain the judicial tolerance for divergent state policies toward undocumented aliens. For example in *De Canas v. Bica*<sup>148</sup>, the court has upheld a California law criminalizing the employment of illegal aliens. Other sources of immigration power are also unconvincing –nothing in foreign affairs power, foreign commerce clause or inherent sovereignty power places a categorical ban on Congressional power to authorize states to adopt alienage classifications. For example, the argument that the Compact Clause<sup>149</sup> creates a negative implication that devolution of other foreign affairs powers to the state is not very convincing, since Constitution explicitly prohibits states from engaging in other enumerated foreign affairs activities such as entering into treaties and alliances and granting Letters of Marque and

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<sup>145</sup> Developments in Law – Jobs and Borders, 118 Harv. L. Rev. 2247 (2005).

<sup>146</sup> Articles of Confederation art. IV, para. 1 (U.S. 1781)

<sup>147</sup> The Federalist No. 42, at 238 (James Madison). The Federalist No. 42, supra note 93, at 237-39; The Federalist No. 32, at 199 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[I]f each State had power to prescribe a *distinct rule*, there could not be a *uniform rule*." *Gibbons v. Ogden*, 22 US (9 Wheat) 1, 36 (1824) (emphasis added).

<sup>148</sup> 424 US 351, 355 (1976).

<sup>149</sup> U.S. Const. Art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.")

Reprisals.<sup>150</sup> As such, if anything, the implication from such explicit bars would be that foreign affairs powers that are not barred are in fact permitted.<sup>151</sup>

A useful analogy could be Congressional power to delegate control over Indian affairs to individual states, pursuant to its plenary power. As in immigration, Indian law is an area where government's plenary power enables it to classify individuals in ways that "might otherwise be constitutionally offensive."<sup>152</sup> In *Yakima* the court upheld the statute authoring states to extend criminal and civil jurisdiction over tribal lands, holding that Congress may chose to readjust allocation of jurisdiction between states and tribes.<sup>153</sup> Professor Wishnie<sup>154</sup> challenges this analogy, and argues that the difference in immigration context is that immigration is an exclusive power that may not be delegated in the same manner as a power over Indian affairs.<sup>155</sup> This objection misses the point— the exclusivity dimension of the non-delegation doctrine of immigration applies only to naturalization requirements itself (consistent with the historical purpose of the uniformity clause). However, when it comes to a broader spectrum of rights arising out of alien's classifications – access to jobs and welfare being the prime example, Congressional power to delegate is not so limited.

Overall, I believe that explicit delegation doctrine and its twin principles of transferability and anti-inherency is applicable in both intra-federal and federal-to-state contexts. The bottom line is that, if these two principles are to be taken seriously, Congressional delegation will have to be much more explicit in its form, clearly

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<sup>150</sup> U.S. Const. Art. I, §8. cl 11.

<sup>151</sup> Developments in Law – Jobs and Borders, 118 Harv. L. Rev. 2247, 2267 (2005).

<sup>152</sup> *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 US 463, 501 (1979).

<sup>153</sup> *Id.*

<sup>154</sup> Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493 (2001)

<sup>155</sup> *Id.* at 563-64.

articulating the scope of the power being delegated (transferability), and the precise authority to which this power is being delegated (anti-inherency).

### **Part III – judicial review under the new regime of explicit delegation**

#### *Section A: The role of judicial review in the context of delegation*

Given the emphasis that explicit delegation doctrine places in ensuring transparency and accountability of Congressional delegation in both intra-federal and federal-to-state contexts, the role of the judicial review of agency or state action pursuant to such delegation becomes critically important. I believe that in instances where Congress adopts explicit delegation as a way to delegate its legislative power to either administrative agency or a state, judicial review of agency's or state's regulation pursuant to that delegation must follow a deferential standard first articulated in the famous *Chevron*<sup>156</sup> case. However, if Congress chooses to follow the current “intelligible principle” standard when delegating its power in immigration or alienage law context, courts should apply a more searching scrutiny, asking whether agency's or state's decision is motivated by a compelling interest and is narrowly tailored to that interest.<sup>157</sup> Of course one must first examine the current state of judicial review to be able to extrapolate the shape such review may take in the context of explicit delegation.

#### *Section B: Judicial review in the current non-delegation regime.*

The weakness of the current non-delegation doctrine led the Court to adopt rules that would allow it to review and invalidate agency decisions that it viewed as stemming

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<sup>156</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (adopting a two-step deferential approach to reviewing agency decisions: In the first step, the court asks whether Congress has spoken to the precise issue or has left a gap for the agency to fill. If Congress has in fact spoken clearly on the issue in question, then that meaning is dispositive, regardless of what the agency has to say. If however, and most often, the legislative provision is ambiguous, the second question of *Chevron* is whether the agency's interpretation is permissible or reasonable).

<sup>157</sup> *See e.g., Graham v. Richardson*, 403 U.S. 365 (1971).

from too broad a reading of delegating statute in question. In other words, the courts changed the focus of the non-delegation doctrine from reviewing the Congressional delegation to reviewing agency's interpretation of such delegation.<sup>158</sup> Given the demise of legislative veto in *Chada*<sup>159</sup> judicial review effectively became the only check against administrative agency's action outside the bicameral process of legislation and presentment.<sup>160</sup> When reviewing interpretations that agencies make in the context of their delegated power, the courts often follow a two step process: they first look at the canons of judicial interpretation to avoid invalidation of Congressional delegation, and then apply *Chevron*<sup>161</sup> standard of review when examining the administrative action stemming from such delegation.

When applying the canons of judicial interpretations, the courts use clear-statement rule and cannon of avoidance to ensure that whatever Congressional delegation is passed, it is upheld. In *Kent v. Dulles*,<sup>162</sup> the Court applied the canon of clear-statement and refused to construe a broadly worded statute to permit the Secretary of State the right to travel, although the statute authorized the secretary to issue passports according to the rules set by the President, who, in turn, gave the Secretary discretion to deny passports for any reason.<sup>163</sup> The Secretary used that discretion to deny passports to members of Communist party.<sup>164</sup> The court construed the statute narrowly, citing *Panama Refining*<sup>165</sup> as a precedent for "important constitutional questions" a broader reading would have

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<sup>158</sup> See, Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2110-15 (1990).

<sup>159</sup> I.N.S. v. Chadha, 462 U.S. 919 (1983).

<sup>160</sup> *Id.*

<sup>161</sup> 467 U.S. 837 (1984).

<sup>162</sup> 357 US 116 (1958).

<sup>163</sup> *Id.* at 129.

<sup>164</sup> *Id.* at 123

<sup>165</sup> 293 U.S. 388 (1935).

entailed. The court held that in cases where individual liberties may be curtailed, Congress needs to make a “clear statement” to that effect in the statute.<sup>166</sup> Canon of avoidance is another theory that allows the Court to avoid interpretations that are constitutionally suspect on the legal fiction that Congress would not have intended such interpretations.<sup>167</sup>

The *Chevron* review of agency actions stems from, perhaps, one of the most significant cases of the 20<sup>th</sup> century *Chevron, USA, Inc., Co. v. Natural Resource Defense Council*.<sup>168</sup> The outcome of that case signaled a new regime for reviewing agency’s interpretations of federal statutes. In *Chevron* the Court announced that it will defer to a reasonable agency interpretation of ambiguous statutory terms, and devised a two-step way for determining when this deference should be exercised.<sup>169</sup> In the first step, the court asks whether Congress has spoken to the precise issue or has left a gap for the agency to fill.<sup>170</sup> If Congress has in fact spoken clearly on the issue in question, then that meaning is dispositive, regardless of what the agency has to say.<sup>171</sup> If however, and most often, the legislative provision is ambiguous, the second question of *Chevron* is whether the agency’s interpretation is permissible or reasonable.<sup>172</sup>

Although deferential in principle, *Chevron* has been often circumvented by judges both on the left and right who disagreed with the agency interpretation. As such, Justice

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<sup>166</sup> *Id.* at 129.

<sup>167</sup> *Rust v. Sullivan*, 500 US 173, 191 (1991) (Upholding federal regulations that prohibited programs that received federal funds from engaging in specified abortion-related conduct and counseling, stating that regulations were based on a permissible reading of the statute.).

<sup>168</sup> 467 U.S. 837 (1984)

<sup>169</sup> *Id.* at 842-43.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*



Stevens in *I.N.S. v. Cardoza-Fonesca*,<sup>173</sup> rejected INS's statutory interpretation of the words "well-founded fear of prosecution" as flatly wrong."<sup>174</sup> When interpreting the statute INS attributed the same meaning to the phrase as the mandatory-asylum provision of the statute, which prohibited deportation of any alien who showed a "clear probability of persecution."<sup>175</sup> Although Justice Stevens acknowledged that there was some ambiguity in the statute, he nonetheless felt that text and legislative history made it clear what the "right" meaning of the term was.<sup>176</sup> Justice Scalia had likewise refused to defer to agency interpretation of a seemingly ambiguous statute in *Maislin Indus. v. Primary Steel*, where he refused to show deference to the Interstate Commerce Commission's take on the word reasonable as used in Interstate Commerce Act.<sup>178</sup>

Overall, the judicial review regime currently in place effectively transfers the authority over the final say regarding the specifics of delegation from Congress to the Courts. Faced with exceedingly vague Congressional declarations, agencies are often at the mercy of the ideological winds of the federal courts who end up to be the final arbiter's of what the Congress "meant to say" when in reality Congress said precisely nothing.

#### Section C: *Judicial review in the context of explicit delegation*

In the context of explicit delegation in immigration and alienage law, the courts should apply *Chevron* deference much in the same manner it has been applied before. The difference lies not in the new standard but in the increased guidance that

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<sup>173</sup> 480 US 421 (1987).

<sup>174</sup> *Id.* at 430.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* 448.

<sup>177</sup> 497 US 116, 136-38 (1990).

<sup>178</sup> *Id.*

Congressional delegation would contain. Such guidance would make the first step of Chevron applicable in more cases, and where it would not be – it would make the interpretation of what Congress considered reasonable that much clearer. The courts would then have a much easier time reviewing the agency’s decision based on what Congress actually meant to say, instead of substituting their own versions of what Congress intended in its vague proclamations over the similar guesses of the agencies.

The real difference will come when agency decisions stem from Congressional declaration that does not follow the explicit delegation doctrine, but instead relies on the vague pronouncements of the old non-delegation principles. In this latter case, the courts should review the agency’s decisions dealing with immigration and alienage law applying the strict scrutiny standard, first articulated in this context in *Graham*<sup>179</sup> to police against Congress trying to siphon its plenary immigration power in a constitutionally prohibited manner.

Crucially, this two-tiered system of judicial review should apply with equal force to Congressional delegation of immigration power to agencies and the states. As was previously argued, nothing in either naturalization clause, history or original intent of the framers precludes Congress from delegating its plenary power to either states or federal agencies *on the equal basis*.<sup>180</sup> The current regime of judicial review of Congressional delegation to the states remains confused and mangled at best – the decisions in *Aliessa*<sup>181</sup>

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<sup>179</sup> *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>180</sup> See discussion in Part II, section A, *infra*.

<sup>181</sup> 754 N.E.2d 1085 (N.Y. 2001) (holding that in enacting Title IV of Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) the Congress has impermissibly delegated critical immigration policy powers to the states.).

and *Soskin*<sup>182</sup> provide apt demonstration. It would therefore follow that the courts should apply the same standards of review of delegation in both contexts, removing the need for doctrinal confusion that began with the *Graham/Mathews* decisions and continues to this day in *Aliessa* and *Soskin*.

## **Conclusion**

We are a nation of immigrants. This phrase has been repeated so often that it has become a cliché, yet it is almost universally accepted as true.<sup>183</sup> Another phrase that often accompanies the first one is that we are all Americans. An outsider is likely to conclude after hearing these two phrases together that we are a nation of immigrants who are all Americans. Ironically, this would be wrong. Instead, the idea of who belongs and who doesn't is defined by a vague, shifting and uncertain patchwork of laws, customs, history and assumptions that Americans, their government and immigrants make about what it takes to be an American.

This ambivalence about national identity coupled with the tremendous power that Congress wields on issues pertaining to immigration and alienage law makes the need for transparency pertaining to how and to whom Congress delegates its power particularly acute. Indeed, legislative transparency is the only way to ensure that Congress remains accountable for the legislative choices that it makes on these difficult issues. The current state of Congressional delegation in the context of immigration and alienage law is too

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<sup>182</sup> 353 F.3d. 1242, 1255 (10<sup>th</sup> Cir. 2004) (upholding Colorado's decision to continue to provide federal Medicaid coverage to qualified aliens who had resided in the United States for longer than five years, even though §1612(b) of PRWORA's authorized the state to deny coverage to such aliens.) Id. at 1246.

<sup>183</sup> Of course, Native Americans, the first true settlers of the continent may disagree. One may argue, however, that even they are, in the broadest sense, immigrants – having traversed the Bering straits some 30,000 years ago to settle the Western Hemisphere. Smithsonian Institution, Paleoamerican Origins, *at* <http://www.si.edu/resource/faq/nmnh/origin.htm>.

vague and inconsistent to meet the standard of democratic accountability that is required given the plenary power of Congress over the matter.

This article sought to present an alternative way to frame Congressional delegation of plenary power - a way in which Congress can delegate its power *in both* intra-federal and federal-to-state contexts, as long as such delegation remains explicit. I called this view explicit delegation. I believe explicit delegation is a better way to achieve legislative transparency, which is a necessary check on plenary power of Congress over the matter.

The first part of my proposal deals with the way Congress delegates power. In this context I argue that explicit delegation, with its principles of anti-inherency and transferability, while functionally preserving the current administrative state, would provide a coherent doctrinal backdrop for the Congress to justify its delegation practices. The second part of my proposal suggested that adopting explicit delegation as a principle vehicle for delegating power would allow Congress to delegate its plenary power on an equal basis to federal agencies and individual state governments.

Finally, the third part of my proposal outlined the level of judicial review the courts should exercise when reviewing agency's or state's decisions pursuant to Congressional delegation of power in matter of immigration and alienage law. As such, I suggest that where Congress adopts explicit delegation as means of transferring its power to *either* a state or a federal agencies, the courts should adopt deferential standard of review first articulated in the famous *Chevron* case, where reviewing the interpretation the state or the agency make of the authorizing statute. On the other hand, where Congressional delegation falls short of this standard, the courts should exercise the strict

scrutiny of the kind articulated in *Graham* when assessing the state's or agency's interpretation of the statute in question.

I believe that adoption of explicit delegation as a principle lens through which courts view Congressional delegation of its legislative authority in the context of immigration and alienage law will placate numerous critics of the current non-delegation doctrine, preserve the functionality and flexibility of the current administrative state, and allow the states the flexibility they need to deal with immigration and alienage law issues particular to their unique environments. Most importantly, I believe Congressional delegation that is clear about the extent and the source of the authority it delegates will make American democracy stronger by conferring a great degree of legitimacy to the agencies' and states' actions resulting from such delegation.